

Section 24.8 Section 106 Process

Any project, activity, or program funded in whole or in part, under the direct or indirect jurisdiction of a Federal agency, including those carried out on behalf of a Federal agency; and those actions requiring a federal permit, license, or approval, are considered to be an undertaking and are, thus, subject to the requirements detailed in Section 106 of the National Historic Preservation Act of 1966.

FHWA must fulfill its responsibilities under Section 106 of the NHPA, prior to the approval of NEPA. In turn, NEPA approval (Documented Categorical Exclusion (CE), Finding of No Significant Impact (FONSI), or Record of Decision (ROD)) is required, by FHWA regulation, prior to FHWA approval of funding for right of way acquisition or construction. In order to sign a final Environmental Impact Statement (EIS) or final Environmental Assessment (EA), the FHWA Transportation and Environmental Engineer will need to verify that the document includes the results of the consultation requirements under the NHPA. In order to complete the NEPA process by signing a ROD, FONSI, or Documented CE the FHWA Transportation and Environmental Engineer will need to verify that the requirements above have been met, including completion of coordination with State Historic Preservation Officer (SHPO)/Tribal Historic Preservation Officer (THPO), and, if necessary, the Advisory Council on Historic Preservation (ACHP).

Due to the requirements of agencies to meet their responsibilities under the NHPA, the following sections are the interim procedures. These procedures are continually being reviewed and revised which will result in updates by the Highways and Local Programs Service Center.

.81 Identification of Historic Properties. The agency must coordinate with the SHPO/THPO to:

- determine the area of potential effects (APE).
- review existing information on historic properties within the APE.
- seek information, as appropriate, from tribal organizations, Native Hawaiian organizations, and other individuals and organizations likely to have knowledge of, or concerns with, historic properties within the APE.

The local agency must submit a letter containing the following information to the Regional Local Programs Office:

- description of the project
- location of the project, including legal description
- age of any structures present, if applicable (i.e., bridges, buildings, etc.)
- maps and photos
- a list of Tribes that should be included as potential consulting parties (see Appendix 24.109 for assistance)

The Regional Local Programs Office will transmit the letter to the Highways and Local Programs Service Center. Upon receipt of the documentation and review, the Highways and Local Programs Service Center will transmit the letter to the SHPO/THPO, requesting comments or information such as in identifying historic properties within the area of potential effects. The Highways and Local Programs Service Center will also transmit a copy of the letter to FHWA, in order to initiate consultation with the appropriate Tribal governments. The local agency should include sufficient copies of the documentation, so as to provide two (2) copies each to each identified Tribal government, as well as a copy for FHWA's files. Upon receipt of documentation and review, FHWA will send a formal letter to the identified tribe(s), as well as any other tribe (s) FHWA determines to be appropriate, to initiate the Section 106 consultation, normally within fifteen (15) days of receipt of request. If a response from a tribe is not received within thirty (30) days after the delivery date of the initiation of consultation letter, project development will be allowed to move forward. The tribes do have the option, however, of entering consultation at a later date.

The local agency and the Regional Local Programs Office will assume the lead in conducting Section 106 consultation with the tribal governments, after FHWA has initiated the consultation process with the written request. FHWA will be available, however, to participate in Section 106 consultation with a tribe to the extent necessary, to ensure the tribe's meaningful participation in the process.

In addition to these requests, a local agency may also be required to search through the physical records located at the Office of Archaeology and Historic Preservation (OAHP) for identification of eligible historic properties and archaeological sites, if the project does not fall into one of the categories listed in Section 24.82 (a).

- .82 Project Evaluation.** Section 106 of the NHPA requires that any federal aid project must be evaluated to determine its effects on historic properties. The information from Section 24.81 will assist the agency in completing a project evaluation. The evaluation is a guide to assess the project's impacts to historic properties.

Depending upon the evaluation and the extent of the project's impacts, the effect determination (Section 24.83) will be one of the following conclusions:

- No historic properties affected
- Finding of no adverse effect
- Adverse effect

The agency will detail the impacts of the project through either:

- a. "No historic properties affected" report. Typical items to include in the report are:

- Description of undertaking;
- Description of APE, including photographs, maps, drawings, as necessary;
- Description of steps taken to identify historic properties;
- Justification for determination of no historic properties present or affected.

The following list identifies those undertakings that have limited areas of impact which are unlikely to contain properties listed or eligible for inclusion in the National Register of Historic Places. These projects can be considered to have no effect on historic properties. If your project falls under one of the below categories, the local agency is not required to consult with SHPO or with the tribes on the APE and the impacts of the undertaking, as outlined in Section 28.81. Although consultation with the tribes will not be initiated, a monthly general notice will be sent to the tribes informing them of which projects met the programmatic exemptions.

- A. All work to be done on bridges of the National Highway System (NHS) and non-NHS state highways which are less than 40 years old, unless an inventory has shown the bridge to be exceptionally significant.
- B. All work within interchanges and within medians of divided highways unless the median has been undisturbed by construction.
- C. All work between a highway and an adjacent frontage road, unless the area between is undisturbed.
- D. Replacement or extension of culverts and other drainage structures with waterway openings of 100 square feet (9.3 square meters) or less and which *do not* extend beyond previous construction limits.
- E. Roadway surface replacement, overlays, shoulder treatments, pavement repair, seal coating, pavement grinding, and pavement marking where there will be no expansion of wearing surface, unless within a historic district.
- F. Installation of new lighting, signals, and other traffic control devices, and replacement or repair of lighting, signals, and traffic control devices where the existing units were installed less than 50 years ago, except if the project is immediately adjacent to, or located within, eligible bridges, historic properties, or historic districts.
- G. Installation, replacement, or repair of safety appurtenances such as guardrails, barriers, glare screens, and energy attenuators (except on National Register listed or previously determined eligible bridges, properties, or districts).

- H. Fencing, including salvage yards, provided no grading or other landscaping is involved.
- I. Landscaping on fillslopes and backslopes only. All landscaping beyond toe of fillslopes or beyond top of backslope must be reviewed.
- J. Repair or replacement in kind of curb and gutter, sidewalk and catch basins on the same location except the following: Replacement projects and construction of handicapped access ramps projects adjacent to National Register eligible or listed properties.
- K. Railway crossing signs and signal installation or modification and surface improvement.
- L. Emergency structural repairs to maintain the structural integrity of a bridge (except National Register listed or eligible bridges), roadway overlays, and painting. Bridge reconstruction which does not include roadway widening or modification of existing piers and abutments, but which may include bridge repairs, deck replacement or repair, railing repair and other maintenance work.
- M. Construction of turning lanes and pockets, auxiliary lanes (e.g., truck climbing, acceleration and deceleration lanes) and shoulder widening where only placement of fill material is involved, or within an area previously disturbed by vertical and horizontal construction activities.
- N. Placement of fill material on the side slopes of intersection crossroads and accesses for purposes of flattening these slopes to meet safety criteria, provided that no topsoil is removed beyond the area of previous horizontal and vertical disturbance.
- O. Hazardous waste removal and disposal from within an area previously disturbed by vertical and horizontal construction activities, which constitutes a public hazard and which requires immediate removal.
- P. Placement of riprap within an area previously disturbed by vertical and horizontal construction activities, to prevent erosion of waterways and bridge piers.
- Q. Routine roadway, roadside, and drainage system maintenance activities necessary to preserve existing infrastructure and maintain roadway safety, drainage conveyance, and stormwater treatment in previously disturbed areas.

If the local agency determines that their project is included in one of the types of exempted activities listed above, the local agency must document this determination in Part 4, Question 3 of the Environmental Classification Summary.

- b. “No adverse effect” and “Adverse effect” reports. Typical items to include in the report are:

- Description of undertaking;
- Description of APE, including photographs, maps, drawings, as necessary;
- Description of steps taken to identify historic properties;
- Description of the affected historic properties;
- Description of the undertaking’s effects on historic properties;
- Justification for why the criteria of adverse effect were found applicable or inapplicable; including any conditions or future actions to avoid, minimize, or mitigate adverse effects;
- Copies or summaries of any views expressed by consulting parties or public comment.

Projects which involve the excavation of previously undisturbed areas or require the acquisition of new right of way have the potential to uncover archaeological or historical resources. Under these conditions, an archaeological survey must be considered. For information on archaeological surveys, contact the Regional Local Programs Engineer.

.83 Effect Determinations. If a federal aid project is in an area where historic properties are present, the NHPA requires that FHWA make a determination of effect of the project on those properties. FHWA must make this determination of effect in consultation with SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to the identified properties.

- a. No historic properties affected. This is the appropriate conclusion if the project has no impact on any historic properties or if there are no historic properties present.

If the local agency determines that the undertaking fits within one of the categories listed in Section 24.82 (a), the local agency must document this in the Environmental Classification Summary’s Section 4, part 3.

If the undertaking does not fall under one of the categories listed in Section 24.82 (a), but the local agency determines that either no historic properties are present or there are historic properties present but the undertaking will have no effect upon the properties, the local agency shall provide documentation of this finding, including the information outlined in Section 24.82 (a), to the Regional Local Programs office. The Regional Local Programs office will forward the documentation to the Highways and Local Programs Service Center. Upon receipt of documentation and review, the Highways and Local Programs Service Center will transmit the documentation to SHPO/THPO. The local agency shall

notify all consulting parties, including Indian tribes and Native Hawaiian organizations, and make the documentation available for public inspection prior to approving the undertaking.

The documentation for the no historic properties affected determination, may be included with the documentation sent to SHPO/THPO for the identification of the APE.

If the SHPO/THPO does not object to the agency's findings within 30 working days of receipt of an adequately documented finding, the local agency has fulfilled their responsibilities under Section 106.

Once concurrence has been obtained from SHPO/THPO or the 30 day period has lapsed, the FHWA Transportation and Environmental Engineer can finalize the NEPA documentation and subsequently authorize the right of way or construction phase of a project.

- b. No adverse affects. This conclusion is appropriate when historic properties are present and an undertaking may affect historic properties, but the impacts of the project do not fulfill the criteria for an adverse effect (as outlined in Section 24.83 (c)).

The local agency, after consultation with the SHPO/THPO, may propose a finding of no adverse effect when the undertaking's effects do not meet the criteria for an adverse effect, or the undertaking is modified or conditions are imposed by the SHPO/THPO to prevent an adverse effect on historic properties. If the local agency proposes a finding of no adverse effect, the local agency must notify the Regional Local Programs office and all other consulting parties by providing them with the documentation specified in Section 24.82 (b). The Regional Local Programs office will forward the documentation to the Highways and Local Programs Service Center. Upon receipt of documentation and review, the Highways and Local Programs Service Center transmits the documentation to SHPO/THPO for review. The SHPO/THPO shall have 30 days from receipt to review the finding.

The local agency may proceed forward with the undertaking if the SHPO/THPO agrees with the no adverse effect finding or if the 30 days lapse without a response. Failure of the SHPO/THPO to respond within 30 days of receipt of the finding shall be considered agreement of the SHPO/THPO with the finding. With SHPO/THPO concurrence, the local agency must maintain a record of the finding and provide information on the finding to the public on request. Implementation of the undertaking in accordance with the finding as documented, fulfills the local agency's responsibilities under Section 106 of the NHPA.

Disagreement with the finding. If the SHPO/THPO or any consulting party disagrees with the local agency's finding, within the 30 day review period, it shall specify the reasons for disagreeing with the finding. The local agency shall either consult with the party to resolve the disagreement or may request the ACHP, through FHWA, to review the finding.

If a finding is submitted to the ACHP, the local agency must provide all documentation as detailed in Section 24.82 (b). The ACHP shall review the finding and notify the local agency of its determination within 15 days of receiving the documented finding from the local agency. The ACHP shall specify the basis for its determination. The local agency must proceed in accordance with the ACHP's determination. If the ACHP does not respond within 15 days of receipt of the finding, the local agency may assume concurrence with their findings and proceed accordingly.

The local agency should seek the concurrence of any Indian tribe and Native Hawaiian organization that has made known to the local agency that it attaches religious and cultural significance to a historic property subject to the finding. If such Indian tribes or Native Hawaiian organizations disagree with the finding, it may, within the 30 day review period, specify the reasons for disagreeing with the finding and request the ACHP review the finding.

Upon completion of the concurrence process or the lapse of the 30 day review period, the Highways and Local Programs Service Center sends the concurrence letter to FHWA, and the FHWA Transportation and Environmental Engineer can finalize the NEPA documentation and subsequently authorizes funding for the right of way or construction phase of the project.

- c. Adverse effects. This conclusion is appropriate when the project has an effect on the historic properties present. An adverse effect is appropriate when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association.

Adverse effects on historic properties include, but are not limited to:

- physical destruction of or damage to all or part of the property;
- alteration of a property, including restoration, rehabilitation, repair, maintenance, etc., that is not consistent with the Secretary's Standards for the Treatment of Historic Properties (36 CFR Part 68) and applicable guidelines;
- removal of the property from its historic location;
- change of the character of the property's use or of physical features within the property's setting that contribute to its historic significance;

- introduction of visual, atmospheric, or audible elements that diminish the integrity of the property's significant historic features.

If an adverse effect is determined, the local agency must document its findings as outlined in Section 24.82 (b). The local agency, Highways and Local Programs and FHWA, must consult with the SHPO/THPO and other consulting parties, including Indian tribes and Native Hawaiian organizations, to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties.

The local agency will transmit their findings to the Regional Local Programs Office. The Regional Local Programs Office will transmit the documentation to the Highways and Local Programs Service Center, which will transmit the documentation to FHWA. FHWA will notify the ACHP of the adverse affect finding by providing the documentation specified in Section 24.82 (b). The notice shall invite the ACHP to participate when the FHWA desires Council participation; the undertaking has an adverse effect upon a National Historic Landmark; or a programmatic agreement under Section 800.14 (b) of 36 CFR Part 800 will be prepared. The ACHP shall advise FHWA and all other consulting parties whether it will participate within 15 days of receipt of notice.

The local agency will provide the Regional Local Programs office and all consulting parties, the documentation detailing its finding, and will also make this information available for public comment. The Regional Local Programs office will send the documentation to the Highways and Local Programs Service Center. Upon receipt of documentation and review, the Highways and Local Programs Service Center will transmit the documentation to SHPO/THPO for review. The local agency, Highways and Local Programs, and FHWA must consult with the SHPO/THPO and other consulting parties to seek ways to avoid, minimize or mitigate the adverse effects. If the local agency, Highways and Local Programs, FHWA, and the SHPO/THPO agree on how the adverse effects will be resolved, all parties will execute a Memorandum of Agreement (MOA). The FHWA will submit a copy of the executed MOA to the ACHP, prior to approving the project, in order to fulfill the requirements of Section 106.

Upon execution of the MOA, the consultation process is completed and FHWA can approve the environmental documentation and authorize participation of federal funds.

If agreement between the local agency, Highways and Local Programs, FHWA, and SHPO/THPO, as well as other consulting parties, cannot be reached, FHWA cannot approve the environmental documentation and will not approve participation with federal aid funds. Federal aid funds cannot be used to build the project.